

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

LEO R. OLIVAS,)	
)	
Claimant,)	IC 2000-038230
)	
v.)	
)	
BARCLAY MECHANICAL SERVICES,)	
)	
Employer,)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
and)	AND RECOMMENDATION
)	
INSURANCE COMPANY OF THE WEST,)	Filed June 29, 2007
)	
Surety,)	
)	
Defendants.)	
_____)	

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Boise on October 24, 2006. Claimant was present and represented by Brett R. Fox of Boise. Thomas V. Munson, also of Boise, represented Employer/Surety. Oral and documentary evidence was presented. The parties took two post-hearing depositions and submitted post-hearing briefs and this matter came under advisement on May 21, 2007.

ISSUES

As agreed upon by the parties, the issues to be decided are:

1. Whether and to what extent Claimant is entitled to permanent partial disability (PPD) benefits above his permanent partial impairment (PPI); and
2. Whether Claimant is entitled to attorney fees pursuant to Idaho Code § 72-804 for Surety's failure to timely pay PPD benefits.

CONTENTIONS OF THE PARTIES

Claimant contends that as the result of a partial amputation of his left index finger, he is entitled to whole person PPD of 29.2% inclusive of his 8% whole person PPI. He further argues that he is entitled to attorney fees because Defendants have paid nothing toward his undisputed PPD.

Defendants contend that Claimant is exaggerating his symptoms and that no medical evidence substantiates his subjective physical limitations. In fact, the medical evidence suggests that he could return to his occupation as a welder without any disability above his impairment. Finally, Claimant is not entitled to attorney fees as Defendants reasonably contested his alleged disability.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant taken at the hearing.
2. Claimant's Exhibits 1-3 admitted at the hearing.
3. Defendants' Exhibits A-L admitted at the hearing.
4. The post-hearing depositions of vocational rehabilitation counselors Mary Barros-Bailey taken by Claimant on December 19, 2006, and Rena Matter taken by Defendants on January 16, 2007.

Defendants' objection at page 27 of Ms. Matter's deposition is sustained. Their objection at page 28 of Ms. Matter's deposition is overruled.

After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. Claimant was 47 years of age and resided in Boise at the time of the hearing. At the time of his industrial accident, Claimant was employed as a welder/fabricator at Employer's Paul, Idaho, fabricating plant and had been so employed since December 1997.

2. On November 20, 2000, Claimant was using a roller, rolling metal when his glove got caught in the machine. It pulled his hand under the roller and crushed his left index finger.

3. Claimant came under the care of Gilbert K. Crane, M.D., an orthopedic surgeon in Burley. On November 20, 2000, Dr. Crane performed revision amputation and irrigation debridement on Claimant's left index finger at the level of the PIP joint.

4. Claimant's finger healed appropriately and on December 15, 2000, Dr. Crane released Claimant to return to modified work with limited use of his left hand.

5. Claimant returned to work without difficulty for a few weeks until he turned on a grinder and felt, for the first time since his accident, intense pain at the amputation site of his left index finger. At that time, Claimant became concerned that he may re-injure his finger and decided to quit when no lighter work was available.

6. On February 15, 2001, Dr. Crane released Claimant to work without restrictions.

DISCUSSION AND FURTHER FINDINGS

PPD:

"Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by

the medical factor of impairment and by pertinent non-medical factors provided in Idaho Code §72-430. Idaho Code § 72-425. Idaho Code § 72-430(1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of the accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant, provided that when a scheduled or unscheduled income benefit is paid or payable for the permanent partial or total loss or loss of use of a member or organ of the body no additional benefit shall be payable for disfigurement.

The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is “whether the physical impairment, taken in conjunction with non-medical factors, has reduced the claimant’s capacity for gainful employment.” *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). In sum, the focus of a determination of permanent disability is on the claimant’s ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

7. Claimant testified at hearing that his left index finger is sensitive to cold, touch, and vibrations. When his finger gets too cold, i.e., below 80 degrees, it causes pain unless he wears a glove. At hearing, Claimant testified with his ungloved hand under his right armpit to keep his finger warm, although it was not cold in the hearing room. He testified that the pain in his left index finger was at a 3/10 at hearing room temperature.

FINDINGS, CONCLUSIONS, AND RECOMMENDATION - 4

8. Claimant worked for a short time at a sod farm in Declo after he quit at Employer's. However, he was forced to quit the sod-cutting job due to the vibration of the machine he used. He then moved to Boise in July 2001, reasoning that the larger labor market would make it easier to secure employment.

9. After moving to Boise, Claimant has been employed as a painter, landscaper, truck driver, and, at the time of the hearing, a certified emissions tester at a mobile emission testing van.

The vocational experts

Barbara K. Nelson, M.S., CRC:

10. Ms. Nelson is a vocational counselor retained by Claimant to perform an employability analysis. She prepared a report in that regard dated May 21, 2002. Therein, Ms. Nelson notes that Dr. Crane gave the following permanent restrictions: no work in the cold, no use of equipment that causes vibration such as grinders, jackhammers, and air guns, and no fine manipulation/fingering with the left hand. Ms. Nelson described Claimant as having a good work ethic and job seeking skills, but lacked training in areas outside of farm work and welding. She opined that Claimant has lost 46% of his pre-injury wage earning capacity and 23% loss of access to his pre-injury labor market. Ms. Nelson determined Claimant's whole person PPD to be 23% inclusive of his 8% whole person PPI although, "[I]n all fairness to Mr. Olivas, his disability should probably be placed closer to 34.5%, which is the midpoint between his comparative wage loss and his loss of access to the labor market." Claimant's Exhibit 1, p. 4.

Mary Barros-Bailey MA, CRC, CDMS, CLCP, NCC, ABVE-D:

11. Claimant also retained Ms. Barros-Bailey to prepare a disability evaluation, which she accomplished on May 26, 2006. Ms. Barros-Bailey interviewed Claimant and reviewed

pertinent medical records. She reported that Claimant was earning \$14.78 an hour pro-rated for overtime, plus benefits, at the time of his industrial accident. She commented that Claimant's current employment as an emissions tester is, according to Claimant, "a perfect job for him," and he has no intention of looking for additional work. Claimant's Exhibit 3, p. 5. Ms. Barros-Bailey estimates that Claimant has lost access to between 11% and 20% of the jobs available to him pre-injury due to his "functional limitations." She did not perform a loss of wage earning capacity analysis, but referred to Ms. Nelson's 46%. She opined his whole person PPD inclusive of his PPI to be between 22.7% and 29.2%.

Rena Matter, M.S.:

12. Defendants retained vocational consultant Rena Matter to explore jobs in Claimant's labor market consistent with his physical restrictions. Ms. Matter authored a report dated October 5, 2006, and, like Ms. Barros-Bailey, was deposed. Ms. Matter interviewed Claimant and reviewed pertinent medical records, ICRD case notes, as well as the reports of Ms. Nelson and Ms. Barros-Bailey. Ms. Matter noted that Claimant earned generally in excess of \$13.00 an hour in the five years preceding his injury. Ms. Matter listed many jobs available to Claimant within his restrictions, although there may be some that would be more difficult for him to do than others. Ms. Matter disagrees with Ms. Nelson and Ms. Barros-Bailey regarding the extent of Claimant's restrictions. She refers to a letter written by Troy B. Watkins, M.D., a hand surgeon to whom Surety referred Claimant for a second opinion, to vocational counselor William Jordan wherein Dr. Watkins stated: "My recommendation now is as it has been, and that is a second ray amputation,¹ but I don't think that the finger that he has now would keep him

¹ This procedure involves amputating the rest of Claimant's index finger and, according to Dr. Watkins, would alleviate Claimant's pain and cold intolerance to the extent that Claimant could return to all aspects of welding. Claimant is not willing to undergo this procedure because Dr. Watkins cannot give him a 100% guarantee that he would be pain-free post-surgery.

from participating in any of those jobs. Defendant's Exhibit J, p. 5. Emphasis in original. "Those jobs" include in part: dump truck driver, semi-truck driver, house painter, heavy equipment operator, and farm worker. Ms. Matter also refers to a letter authored by Dr. Crane to Mr. Jordan in response to the following question: "Do you agree with Dr. Watkins that he cannot go back to welding if he does not have the ray amputation?" Dr. Crane's reply: "The only thing preventing him would be pain. There is no anatomic reason or medical reason why he couldn't do the welding now. I think he could go back to welding but he may have occasional pain if he bumps the finger." Defendants' Exhibit D, p. 6. Emphasis in original.

13. The Referee is not convinced that Claimant is as disabled as he claims to be. While his sensitivity to cold, vibration, and touch is, by its nature, not subject to quantification, the Referee noted at hearing that Claimant was unduly preoccupied with his left index finger. He kept it tucked under his right arm pit even though the temperature in the hearing room was not uncomfortably cold. He wears a glove not only to keep his finger warm, but for cosmetic purposes. He testified that he is self-conscious of people staring at his finger, although it was not all that noticeable unless attention was directed to it. While the Referee will not second-guess Claimant on his reluctance to have the ray amputation, nonetheless it is available to him should he change his mind. Claimant's testimony that welding involves much more than just welding, like using a grinder to clean the welds and that the grinding creates undue pain is well-taken. However, there is little support in the medical records to substantiate Claimant's description of what he cannot do. As Dr. Crane pointed out, "[i]n terms of job restrictions, he is capable of doing any job which he can. The only thing that I can imagine he would be limited in is fine fingering or fine manipulation requiring use of the index [*sic*] and thumb. Other than this I do not believe he should have any significant restrictions. He has the ability to do most jobs and he

is released to full duty with no permanent restrictions.” Defendant’s Exhibit H, p. 9. Emphasis added.

14. Claimant has chosen to operate an emissions testing van earning \$8.00 without benefits. Claimant has also chosen not to have the ray amputation surgery that could, in all likelihood, return him to all areas of the labor market. He supplemented his income by driving, without apparent difficulty, a dump truck in the Cascade area in September 2006 for \$18.00 an hour. He hoped to drive the truck again in the spring. He has expressed a desire to own his own emissions testing van in order to increase his income. As it stands now, the Referee believes Claimant is under-employed. With his limited objective restrictions and even his more subjective restrictions, Claimant can find employment approaching his time-of-injury income. *See*, vocational evaluation of Rena Matter dated October 5, 2006, Defendants’ Exhibit D. Ms. Nelson and Ms. Barros-Bailey place a great deal of emphasis on Claimant’s subjective limitations and too little on those of Drs. Crane and Watkins.

15. When considering the statutory provisions regarding permanent disability including Claimant’s age, education, work and salary history, transferable skills, slight disfigurement, subjective and objective physical restrictions, robust labor market, ICRD case notes, and the three vocational reports, as well as the deposition testimony of Ms. Barros-Bailey and Ms. Nelson, the Referee finds that Claimant is entitled to whole person PPD of 20% inclusive of his whole person PPI of 8%.

Attorney fees:

Idaho Code § 72-804 provides for an award of attorney fees in the event an employer or its surety unreasonably denies a claim or neglected or refused to pay an injured employee compensation within a reasonable time.

16. Claimant has failed to cite authority for the proposition that a surety is required to pay anything toward contested PPD, and the Referee is aware of none. Defendants have brought forth a reasonable argument that Claimant herein is entitled to no PPD. The record fails to lend support to Claimant's contentions regarding attorney fees and none will be awarded.

CONCLUSIONS OF LAW

1. Claimant is entitled to whole person PPD of 20% inclusive of his 8% whole person PPI.
2. Claimant is not entitled to an award of attorney fees.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED this __20th__ day of __June____, 2007.

INDUSTRIAL COMMISSION

_____/s/_____
Michael E. Powers, Referee

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _29th_ day of ___June___, 2007, a true and correct copy of the **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

BRETT R FOX
290 BOBWHITE CT STE 300
BOISE ID 83706-6653

THOMAS V MUNSON
PO BOX 8266
BOISE ID 83707-8266

_____/s/_____

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LEO R. OLIVAS,)	
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Claimant,)	IC 2000-038230
)	
v.)	
)	ORDER
BARCLAY MECHANICAL SERVICES,)	
)	Filed June 29, 2007
Employer,)	
)	
and)	
)	
INSURANCE COMPANY OF THE WEST,)	
)	
Surety,)	
)	
Defendants.)	
_____)	

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers submitted the record in the above-entitled matter, together with his proposed findings of fact and conclusions of law to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with this recommendation. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant is entitled to whole person permanent partial disability of 20% inclusive of his 8% whole person permanent partial impairment.
2. Claimant is not entitled to an award of attorney fees.

3. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all issues adjudicated.

DATED this __29th__ day of __June____, 2007.

INDUSTRIAL COMMISSION

____/s/_____
James F. Kile, Chairman

____/s/_____
R. D. Maynard, Commissioner

____/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __29th__ day of __June____, 2007, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following persons:

BRETT R FOX
290 BOBWHITE CT STE 300
BOISE ID 83706-6653

THOMAS V MUNSON
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BOISE ID 83707-8266

____/s/_____

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